MT LEGISLATIVE HISTORY

Chapter 202 19 85

Bill H _____ (S) 90 Original bill & hist. ✓C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	MAR 8	✓C	Hearing Date(s)	JAN 18	✓C
	MAR 11	✓C		JAN 22	✓C
	_____	___C		_____	___C
	_____	___C		_____	___C
Date Out	MAR 11	✓C		JAN 22	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

1/24	2ND READING PASS	48	
1/26	3RD READING PASS	42	
	TRANSMITTED TO HOUSE		
1/28	REFERRED TO JUDICIARY		
3/08	HEARING		
3/11	COMMITTEE REPORT-BILL CONCURRED		
3/14	2ND READING CONCURRED	89	
3/16	3RD READING CONCURRED	93	
	RETURNED TO SENATE		
3/19	SIGNED BY PRESIDENT		
3/20	SIGNED BY SPEAKER		
3/21	TRANSMITTED TO GOVERNOR		
3/22	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 145 EFFECTIVE DATE: 7/01/85		

SB 86 INTRODUCED BY GALT, SCHYE
END CABLE TV SUBSCRIBERS' EXEMPTION FROM TV DISTRIC
TAX LEVY

1/10	INTRODUCED		
1/10	REFERRED TO TAXATION		
1/24	HEARING		
2/01	ADVERSE COMMITTEE REPORT	38	
2/01	BILL KILLED		

SB 87 INTRODUCED BY MAZUREK
LIABILITY OF PARTNERS AND OTHERS UNDER UNIFORM
LIMITED PARTNERSHIP ACT

1/10	INTRODUCED		
1/10	REFERRED TO JUDICIARY		
1/23	HEARING		
1/23	COMMITTEE REPORT-BILL DO PASS		
1/25	2ND READING PASS	49	
1/28	3RD READING PASS	49	
	TRANSMITTED TO HOUSE		
1/29	REFERRED TO JUDICIARY		
3/07	HEARING		
3/07	COMMITTEE REPORT-BILL CONCURRED		
3/09	2ND READING CONCURRED	95	
3/11	3RD READING CONCURRED	97	
	RETURNED TO SENATE		
3/15	SIGNED BY PRESIDENT		
3/15	SIGNED BY SPEAKER		
3/15	TRANSMITTED TO GOVERNOR		
3/18	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 85 EFFECTIVE DATE: 10/01/85		

SB 88 INTRODUCED BY AKLESTAD
PERMITTING TRANSFER OF MONEY IN POLICE RETIREMENT
FUND TO CITY GENERAL FUND

1/10	INTRODUCED		
1/10	REFERRED TO LOCAL GOVERNMENT		

1/17	HEARING		
2/08	COMMITTEE REPORT-BILL PASS AS AMENDED		
2/11	2ND READING PASS	50	0
2/13	3RD READING PASS	49	0
	TRANSMITTED TO HOUSE		
2/27	REFERRED TO LOCAL GOVERNMENT		
3/23	HEARING		
3/25	COMMITTEE REPORT-BILL CONCURRED		
3/30	2ND READING CONCURRED	94	1
4/01	3RD READING CONCURRED	97	3
	RETURNED TO SENATE		
4/08	SIGNED BY PRESIDENT		
4/09	SIGNED BY SPEAKER		
4/10	TRANSMITTED TO GOVERNOR		
4/12	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 460 EFFECTIVE DATE: 4/12/85		

SB 89 INTRODUCED BY MAZUREK
REVISING LAWS RELATING TO GARNISHMENT OF PERSONAL
SERVICES EARNINGS

1/11	INTRODUCED		
1/11	REFERRED TO JUDICIARY		
1/23	HEARING		
1/28	COMMITTEE REPORT-BILL PASS AS AMENDED		
1/30	2ND READING PASS	49	0
1/30	ON MOTION SEGREGATED FROM COMMITTEE OF WHOLE REPORT		
1/31	2ND READING PASS AS AMENDED	48	1
2/02	3RD READING PASS	44	2
	TRANSMITTED TO HOUSE		
2/27	REFERRED TO JUDICIARY		
3/12	HEARING		
3/20	COMM REPORT-BILL CONCURRED AS AMENDED		
3/23	2ND READING CONCURRED	93	0
3/25	3RD READING CONCURRED	98	0
	RETURNED TO SENATE WITH AMENDMENTS		
4/02	2ND READING AMENDMENTS CONCURRED	50	0
4/04	3RD READING AMENDMENTS CONCURRED	49	0
4/12	SIGNED BY PRESIDENT		
4/15	SIGNED BY SPEAKER		
4/15	TRANSMITTED TO GOVERNOR		
4/18	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 538 EFFECTIVE DATE: 4/18/85		

SB 90 INTRODUCED BY MAZUREK, FULLER
EXPANSION OF DISCOVERY IN CRIMINAL CASES

1/11	INTRODUCED		
1/11	REFERRED TO JUDICIARY		
1/18	HEARING		
1/22	COMMITTEE REPORT-BILL PASS AS AMENDED		
1/24	2ND READING PASS	31	16
1/26	3RD READING PASS	27	19

TRANSMITTED TO HOUSE
1/28 REFERRED TO JUDICIARY
3/08 HEARING
3/12 COMM REPORT-BILL CONCURRED AS AMENDED
3/14 2ND READING CONCURRED 91 [illegible]
3/16 3RD READING CONCURRED 90 [illegible]

RETURNED TO SENATE WITH AMENDMENTS
3/21 2ND READING AMENDMENTS CONCURRED 47 [illegible]
3/23 3RD READING AMENDMENTS CONCURRED 48 [illegible]
3/26 SIGNED BY PRESIDENT
3/26 SIGNED BY SPEAKER

3/26 TRANSMITTED TO GOVERNOR
3/29 SIGNED BY GOVERNOR
CHAPTER NUMBER 202 EFFECTIVE DATE: 10/01/85

SB 91 INTRODUCED BY MAZUREK
GENERAL REVISION AND CLARIFICATION OF VENUE STATUTE
BY REQUEST OF MONTANA SUPREME COURT & MONTANA SUPREME COURT COMMISSION ON RULES OF EVIDENCE

1/11 INTRODUCED
1/11 REFERRED TO JUDICIARY
1/22 HEARING
1/22 COMMITTEE REPORT-BILL DO PASS
1/24 2ND READING PASS 48 [illegible]
1/26 3RD READING PASS 46 [illegible]

TRANSMITTED TO HOUSE
1/28 REFERRED TO JUDICIARY
3/07 HEARING
3/09 COMM REPORT-BILL CONCURRED AS AMENDED
3/14 2ND READING CONCURRED 90 [illegible]
3/16 3RD READING CONCURRED 93 [illegible]

RETURNED TO SENATE WITH AMENDMENTS
3/27 2ND READING AMENDMENTS CONCURRED 50 [illegible]
3/29 3RD READING AMENDMENTS CONCURRED 49 [illegible]
4/04 SIGNED BY PRESIDENT
4/08 SIGNED BY SPEAKER

4/08 TRANSMITTED TO GOVERNOR
4/11 SIGNED BY GOVERNOR
CHAPTER NUMBER 432 EFFECTIVE DATE: 10/01/85

SB 92 INTRODUCED BY CHRISTIAENS, SWIFT, CONNELLY, ET AL.
HANDICAPPED PARKING PRIVILEGE FOR OUT-OF-STATE PERMITTEES

1/11 INTRODUCED
1/11 REFERRED TO LOCAL GOVERNMENT
1/17 HEARING
1/17 COMMITTEE REPORT-BILL DO PASS
1/19 2ND READING PASS 42 [illegible]
1/22 3RD READING PASS 49 [illegible]

TRANSMITTED TO HOUSE
1/23 REFERRED TO LOCAL GOVERNMENT

3/14 HEARING
3/15 COMMITTEE REPORT-BILL CONCURRED
3/18 2ND READING CONCURRED 97 0
3/20 3RD READING CONCURRED 99 0

RETURNED TO SENATE
3/22 SIGNED BY PRESIDENT
3/23 SIGNED BY SPEAKER

3/25 TRANSMITTED TO GOVERNOR
3/29 SIGNED BY GOVERNOR
CHAPTER NUMBER 203 EFFECTIVE DATE: 10/01/85

SB 93 INTRODUCED BY CHRISTIAENS, CONNELLY, KADAS, ET AL.
HANDICAPPED PERSONS' PARKING SPACES REQUIREMENTS

1/11 INTRODUCED
1/11 REFERRED TO LOCAL GOVERNMENT
1/17 HEARING
1/30 COMMITTEE REPORT-BILL PASS AS AMENDED
2/01 2ND READING PASS 49 0
2/04 3RD READING PASS 44 0

TRANSMITTED TO HOUSE
2/27 REFERRED TO LOCAL GOVERNMENT
3/14 HEARING
3/15 COMMITTEE REPORT-BILL CONCURRED
3/18 2ND READING CONCURRED 81 17
3/20 3RD READING CONCURRED 76 23

RETURNED TO SENATE
3/22 SIGNED BY PRESIDENT
3/23 SIGNED BY SPEAKER

3/25 TRANSMITTED TO GOVERNOR
3/29 RETURNED WITH GOVERNOR'S AMENDMENTS
4/02 2ND READING GOVERNOR'S AMENDMENTS CONCURRED 50 0
4/04 3RD READING GOVERNOR'S AMENDMENTS CONCURRED 49 0

TRANSMITTED TO HOUSE
4/09 2ND READING GOVERNOR'S AMENDMENTS CONCURRED 89 6
4/10 3RD READING GOVERNOR'S AMENDMENTS CONCURRED 91 6

RETURNED TO SENATE
4/20 SIGNED BY PRESIDENT
4/22 SIGNED BY SPEAKER

4/23 TRANSMITTED TO GOVERNOR
4/24 SIGNED BY GOVERNOR
CHAPTER NUMBER 616 EFFECTIVE DATE: 10/01/85

SB 94 INTRODUCED BY MCCALLUM
TERMINATES APPOINTMENT TO VACANT ELECTIVE OFFICE AS OF NEXT GENERAL ELECTION

1/11 INTRODUCED

INTRODUCED BY Senate BILL NO. 90
Pinsworth, Furlong

A BILL FOR AN ACT ENTITLED: "AN ACT TO EXPAND DISCOVERY IN CRIMINAL CASES; PROVIDING FOR MUTUAL AND RECIPROCAL DISCOVERY IN CRIMINAL CASES; AND REPEALING SECTIONS 46-15-301 THROUGH 46-15-303, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.

Section 2. Disclosure by prosecution. (1) Within 10 days after arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the defendant and of any person who will be tried with him;

(c) the names and addresses of experts who have

 INTRODUCED BILL SB 90

personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons, including all written reports or statements made by them in connection with the particular case;

(d) a list or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or purportedly belong to the defendant; and

(e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce his punishment therefor.

(2) At the same time the prosecutor shall inform the defendant of and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the accused was a party;

(b) whether a search warrant has been executed in connection with the case;

(c) whether the case has involved an informant, and, if so, his identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and [section 4(2)].

(3) The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for and that he is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at such later time as the court may for good cause permit, together with their relevant written or recorded statements, a list of the names and addresses of all persons whom he intends to call as

rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

Section 3. Disclosure by defendant. (1) At any time after the filing in district court of an indictment or information, the defendant, in connection with the particular crime with which he is charged, shall upon written request of the prosecutor:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of his hair, blood, saliva, urine, or other specified materials that involve no unreasonable intrusions of his body;

(g) provide specimens of his handwriting; or

(h) submit to a reasonable physical or medical inspection of his body; however, such inspection does not include psychiatric or psychological examination.

(2) The defendant is entitled to the presence of

counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law.

(3) Within 20 days after arraignment in district court or at such later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of his intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an essential element of the offense charged. The notice must specify for each defense the names and addresses of the persons that will be called as witnesses at trial in support of the defense. Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except for good cause shown.

(4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names and addresses of all persons, other than

the defendant, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(b) the names and addresses of experts whom he will call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection with the particular case; and

(c) a list of all papers, documents, photographs and other tangible objects that he will use at trial.

(5) The defendant's obligation under this section extends to material and information within the possession or control of the defendant or his attorneys and agents.

(6) Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Section 4. Materials not subject to disclosure. (1)

Except as provided in subsection (2), disclosure is not required for a work product that includes:

(a) legal research, records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecutor or members of his legal or investigative staff, law enforcement officers, or defense counsel or his legal or investigative staff; or

(b) documents made by law enforcement officials for internal communications or law enforcement officers' field notes.

(2) Disclosure of a work product referred to in subsection (1) may be required if exculpatory information is contained therein.

(3) Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

Section 5. Failure to call a witness or raise a defense. The fact that a witness' name is on a list furnished pursuant to [this act] or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows such

comment after finding that the inclusion of the witness' name or the pretrial notice constituted an abuse of the applicable disclosure requirement.

Section 6. Use of materials. Any materials furnished to an attorney pursuant to [this act] may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

Section 7. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, such party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

Section 8. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by [this act] be denied, deferred, or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(b) that the risk cannot be eliminated by a less

substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under [this act], it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit him to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when such presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable under [this act], the entire text of the material must be sealed and preserved in the record in the event of an appeal.

Section 9. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of [this act] or any order issued pursuant to [this act], the court may impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

Section 10. Codification instruction. Sections 1 through 9 are intended to be codified as an integral part of Title 46.

Section 11. Repealer. Sections 46-15-301 through 46-15-303, MCA, are repealed.

-End-

CHAIRMAN--MAZUREK, JOE
NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

SECRETARY-STALEY, CINDY

--BILL NO---	REFER DATE---	HEARING DATE---	CONSIDERATION DATES----------	COMMITTEE ACTION----------	REREFERRED TO COMM----	DATE OUT-
SB0060	1/07	1/23		PASS AS AMENDED		1/23
MAZUREK, JOSEPH P.			REPLACE UNIFORM GIFTS TO MINORS ACT WITH UNIFORM TRANSFERS TO MINORS ACT			
SB0063	1/07	1/21	1/22 2/23	TABLED		2/6
HALLIGAN, MIKE			VALIDATE CONTRACT CLAUSES REQUIRING ARBITRATION			
SB0066	1/12	1/21	1/23	PASS AS AMENDED		1/25
HALLIGAN, MIKE			REQUIRING PLAIN LANGUAGE IN CONSUMER CONTRACTS			
SB0069	1/07	1/14 & 2/13	1/16 2/23	TABLED		2/18
GALT, JACK E.			EXTENDING RESERVED WATER RIGHTS COMPACT COMM'N AND REQUIRING STATUS REPORTS			
SB0085	1/10	1/16		PASS AS AMENDED		1/22
BROWN, BOB			CRIMINAL INTELLIGENCE INFORMATION UNIT			
SB0087	1/10	1/23		DO PASS		1/23
MAZUREK, JOSEPH P.			LIABILITY OF PARTNERS AND OTHERS UNDER UNIFORM LIMITED PARTNERSHIP ACT			
SB0089	1/11	1/23	1/23	PASS AS AMENDED		1/28
MAZUREK, JOSEPH P.			REVISING LAWS RELATING TO GARNISHMENT OF PERSONAL SERVICES EARNINGS			
SB0090	1/11	1/18	XXXXX	PASS AS AMENDED		1/22
MAZUREK, JOSEPH P.			EXPANSION OF DISCOVERY IN CRIMINAL CASES			
SB0091	1/11	1/22	1/22	DO PASS		1/22
MAZUREK, JOSEPH P.			GENERAL REVISION AND CLARIFICATION OF VENUE STATUTES			
SB0097	1/11	1/15	1/15 XXX 2/23	TABLED		1/17
CRIPPEN, BRUCE D.			AMEND CONSTITUTION TO RAISE DRINKING AGE TO 21 -- HIGHWAYS BILL			
SB0098	1/11	1/15	1/17 XXX 1/15, 2/23	TABLED		1/18
CRIPPEN, BRUCE D.			IMPLEMENT PROPOSED CONST. AMEND. RAISING DRINKING AGE TO 21-HIGHWAYS BILL			

IN THE SENATE

March 16, 1985	Received from House.
March 21, 1985	Second reading, amendments concurred in.
March 23, 1985	Third reading, amendments concurred in. Ayes, 48; Noes, 0.
	Sent to enrolling.
	Reported correctly enrolled.

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 18, 1985

The ninth meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on January 18, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senator Galt, who was excused.

Chairman Mazurek turned the chair over to Vice Chairman Daniels while he excused himself to testify on the bill which was to be heard before the committee as he was the sponsor.

CONSIDERATION OF SB 90: Senator Mazurek stated he was introducing SB 90 at the request of the Montana County Attorneys' Association and, in particular, Lewis and Clark County Attorney, Mike McGrath. Senator Mazurek stated this bill is entirely new law and does not amend any existing sections. Its purpose is to establish a procedure for mutual and reciprocal discovery in criminal cases. He stated that in the civil trial setting, there are expansive discovery procedures by which both sides learn in advance of trial what the other side will use as evidence. Although under the current practice, the prosecution makes all of its witnesses available for interviewing by the defense, the defense does not share that obligation. Senator Mazurek believes the prosecution is at a considerable disadvantage. He stated we have had bills which are not as extensive as this in the past, and it has been argued in opposition to those bills that surprise is the only defense, because the state has so many resources. Senator Mazurek believes providing a defense goes further than just hiring counsel. He believes defendants have the ability to hire experts. In light of those real life situations, he does not think that argument holds water. This bill provides that both sides would share the information that is developed. Senator Mazurek then walked the committee through the bill and stated it is a new one which is modeled after procedure that is in place in the state of Arizona.

PROPONENTS: Mike McGrath, Lewis and Clark County Attorney and a member of the County Attorneys' Legislative Committee, spoke in favor of SB 90. Mr. McGrath stated this bill is probably the most significant and at least one of the most important criminal justice bills the committee will hear this session, because it is an issue of fairness to the people that are represented by the prosecution and an issue of fairness to

the jury. He believes it will assure that the jury gets all of the relevant information that is available. Under section 1, those provisions that allow information about electronic surveillance and search warrants are new provisions and expand the rights of the defendant. Section 3 includes items the defendant must presently expose. That is a new provision, but the prosecution's right to it currently exists under present case law. Court decisions say the fifth amendment provisions do not apply to non-testimonial things. Mr. McGrath stated this bill adds another right to the defendant--the right to have his counsel present when those things are done. Section 3, subsection 2, talks about the things the defendant must provide in terms of alibi and self-defense. Those are existing law. The two new additions are they have to give notice if they will use the defense of character or mistaken identity. Mr. McGrath felt section 3, subsection 3, is probably the most important. It requires the defendants disclose who their witnesses will be at trial. Mr. McGrath indicated the court can issue a protective order and preserve the defendant's rights through that method. Mr. McGrath stated you need to be prepared for a trial; successful litigants will spend four to ten times as much time preparing for a trial as they do in trial. In the criminal system, the prosecution opens up its files and gives all of its information to the defense attorney and then geta nothing in return. The prosecution has no idea who the defense witnesses will be or who their experts will be. This bill will resolve that. Mr. McGrath stated one thing the committee will hear about or there will be concern expressed about is whether or not this bill is constitutional, whether it violates the defendant's fifth amendment rights to self incrimination. He stated there are numerous courts that have upheld very similar provisions such as we have here. Ed McLain, Deputy County Attorney from Missoula and a member of the Legislative Committee of the County Attorneys' Association, appeared in support of SB 90. He stated that as Mr. McGrath pointed out, the courts have reviewed this matter several times, and it has not been held to violate any constitutional tests as to the rights against self incrimination. The legislature in prior discovery statutes has commented on the idea behind discovery and the legislative intent. He referred to the comment under Section 45-15-302, MCA, under the compiler's notes. He believes the problem is that in every matter that would be coming before the court, they are tied up in lengthy discovery hearings. This bill would clarify the matters that are discoverable, thus getting at the issue at hand rather than be subjected to matters that may come as a surprise at trial. The rules of civil procedure make things adequate and open. In criminal procedures, some feel there is a necessity that the defendant have the element of surprise available to them. In his opinion, we should be able to get at the issues at hand. Mr. McLain quoted Justice Brennan of the United States Supreme Court, where in the Washington Law Review Quarterly he asked if a trial is a sporting event or a quest for the truth. Mr. McLain wants complete discovery on both sides. John

Connor, Jefferson County Attorney, appeared in support of SB 90. He stated that when he became a prosecutor, he was struck by the disparity that exists between the prosecution and the defense as to discovery. He spends a considerable amount of his time documenting the information he is trying to provide to the defense and making sure he has a record that he has provided it. In return for all of that expenditure of time, he gets nothing in return. He believes the disparity creates problems in the delivery of the justice process itself. He questioned why we cared about this and stated we care about it because as Mr. McLain quoted from Justice Brennan, a trial is a search for the truth. If that is true, then Mr. Connor doesn't feel there is any place for a tactic of surprise if the people that are trying to deliver that truth to the jury. He doesn't think that the constitutional and statutory provisions they afford defendants should allow people who are guilty of some offense to miss responsbility. He thinks on the whole it is an excellent piece of legislation. Mark Racicot, from the Montana Attorney General's office, appeared in support of the bill. Mr. Racicot stated that in Montana at the present time, we do not have a consistent set of rules employed by our courts. Mr. Racicot explained a different set of rules applies in different districts as you go across the state. We do not have a pattern of criminal discovery rules contained in one area in our code. SB 90 is an effort to do that. The constitutional limitation has been addressed by the Arizona Supreme Court and other courts. The most critical area of the bill is in requiring the defendant to provide a list of his witnesses. SB 90 is intended to provide good faith discovery on a reciprocal basis. They think it will reduce surprise, it will provide a fair adversary system, and it will strengthen the integrity of that system. It, more than any other piece of legislation, will provide us with the opportunity to make a better system. This piece of legislation is based on Arizona law, which has been upheld as constitutional. It does not violate the defendant's rights. The bill from a constitutional perspective requires the parties to disclose information they would ultimately reveal in the future anyway. Mr. Racicot doesn't think either side should have something to hide.

OPPONENTS: Karl Englund, attorney from Missoula representing the Montana Trial Lawyers' Association, stated they support some provisions of the bill and have some concerns about others. He asked that the committee members remember that in a criminal trial unlike a civil trial, the defendant's attorney is put in a position where his responsibility is to react to the case put on by the state because the state carries the burden of proof and the defendant is under no compulsion to provide any evidence or testimony to help the state meet its responsibility. Mr. Englund stated a major part of a case from the defense aspect is reaction to the state's case; the defendant may not know exactly what it's going to do until it sees things develop at trial. Section 2, subsection 2(1)(a), is already information that is given to

the defendant in the information. The rest of the information may not be available 10 days after the arraignment. Mr. Englund stated that all of the things listed in Section 3, subsection 1, are already available from the defendant, but it probably is a good idea to codify it in the law. Subsection 3 expands the current notion of what defenses the defendant must give the state notice and includes the good character and mistaken identity defenses. Mr. Englund believes good character may be a reactionary defense. Subsection 4 gives the Montana Trial Lawyers Association the most trouble. All of the information that needs to be provided in that section needs to be provided 20 days after arraignment, which time frame is very unrealistic, particularly in light of the fact the vast majority of cases are defended by attorneys who have a tremendous case load. As to the question of the constitutionality of providing this information, Mr. Englund doesn't think it is as cut and dry as the county attorneys led the committee to believe. Several states have held this type of statute to be unconstitutional infringement on the defendant's fifth (self incrimination) and sixth (competent assistance of counsel) amendment rights. Other case law from the Arizona Supreme Court indicates some of the sanctions in the bill cannot necessarily be applied due to the fourteenth amendment (due process) rights and sixth amendment rights. Mr. Englund believes the statute may not accomplish what is trying to be accomplished here, because defense counsel will be providing large, all inclusive lists of names to preserve their rights, particularly with these quick time frames. He believes there are those problems, but there are also other sections that are good.

QUESTIONS FROM THE COMMITTEE: Senator Blaylock questioned Mr. Englund about his main objection to the 20-day stipulation. Senator Blaylock asked what he thought would be reasonable. Mr. Englund responded 40 or 60 days would be much more realistic. Senator Shaw asked Mr. Englund what are the six states that have declared this unconstitutional. Mr. Englund responded Illinois, Indiana, Kansas, New York, Washington D.C., and possibly New Jersey. Senator Shaw asked if he thinks this would help to speed up trials or does he think it would make it worse. Mr. Englund responded if a situation were to cause a substantial surprise, it would cause substantial delays, although he has been involved in cases where the defense will put on a witness and the judge will allow a short recess for examination. Senator Pinsoneault asked Mr. Englund whether he had served as a prosecutor. Mr. Englund responded negatively. Senator Pinsoneault then asked when he spoke for the Montana Trial Lawyers Association, he was speaking for the concensus of the membership. Mr. Englund stated his obligation is he has a list of people he checks with on criminal bills as they come up. The problems he pointed out are the problems they brought up. Senator Pinsoneault asked what "reaction" had to do with a fair trial. Mr. Englund stated a major part of a defense attorney's job has to do with reacting and

making sure the prosecution proves every aspect of his case beyond a reasonable doubt. Senator Pinsoneault stated he just doesn't know what that adds to the process; believes they should get the discovery over with and get on with the trial itself. Senator Pinsoneault asked how this compared with the federal rules. Mr. McGrath stated he was not entirely sure. As he understands the federal rules, there is little discovery on either side, and he believes in criminal proceedings, the federal rules are archaic. Senator Towe stated he is generally impressed with the drafting of the bill and the approach that it takes, although he has some sensitivity to items in section 3, subparagraphs (a) through (h). He asked if those were all approved constitutionally at this time. Mr. McGrath stated the prosecution is entitled to all of those items right now. As they are not testimonial items, the court allows them to be discoverable. The American Bar Association standards on criminal justice also list those items and say the prosecution should be entitled to them. Senator Towe asked how that is handled mechanically in this bill. Mr. McGrath stated it is not handled in the bill; counsel must work it out informally. He explained that what they do now is get a search warrant. Senator Towe asked if there were resistance, must you go into court and get an order. Mr. McGrath stated no, although he would go into court and ask for an order requiring them to do that. Not use contempt. As witnesses become available, it is an ongoing process up to the point of trial. As more witnesses become available, the list is updated. Senator Towe questioned what page 9, lines 22 and 23, referred to. Mr. McGrath stated the identity of an informant.

CLOSING STATEMENT: Senator Mazurek wanted to respond to the question raised by Senator Blaylock and stated the 20-day period is only a starting point where the information has to be commenced to be shared. He believes arraignment is sometime down the road from arrest, so you may be a month after the offense before you are in a position to begin producing anything. He thinks the bill has been adequately discussed, and it will move the process along more expeditiously and fairly.

Hearing was closed on SB 90.

ACTION ON SB 2: Mr. Petesch explained that the amendments submitted (see Exhibit 1) were suggested yesterday by Senator Towe. Senator Crippen asked if you leave section 6 out of the bill, were you providing that a person over 19 can actually possess booze. Senator Towe stated it is not a crime to possess booze and referred to Section 16-6-305, MCA. Senator Towe stated a person over 19 should not be guilty of a crime for possession. He explained that if his fifth amendment were passed, it would not be an offense for the child to possess. Mr. Petesch stated he had a question regarding the licensing provision and wondered if we might be taking away someone's license. Senator Crippen asked if we were going to try to provide some penalty to a person under

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 01/88

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt			X
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE January 18, 1985

COMMITTEE ON Judiciary

VISITORS' REGISTER SB 90

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Mike McGrath	County Attys		✓	
Marc Racicot	"		✓	
John Connor	County Attorneys		✓	
Mike Edmonds	MT. Trial Lawyers			✓
Joe Roberts	Attorney General		✓	
Susan Cottingham	ACLU			

(Please leave prepared statement with Secretary)

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 22, 1985

The eleventh meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on January 22, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

Chairman Mazurek turned the chair over to Vice Chairman Daniels, as he was the chief sponsor of SB 91 to be heard before the committee.

CONSIDERATION OF SB 91: Senator Mazurek, sponsor of SB 91, stated this is an act to revise the venue statutes in the state of Montana. At the request of the Supreme Court, Senator Turnage introduced SJR 24 last session calling for a study by the Montana Supreme Court, in cooperation with the State Bar and the Legislative Council, to review the venue statutes. The problem which exists is the venue statutes were adopted in 1864 and have not been rewritten. This bill will bring the venue statutes into conformance with what the case law has determined them to be. The bill represents an attempt by the committee to clearly state the current state of the law.

PROPONENTS: Sam Haddon, a lawyer from Missoula and Chairman of the Montana Supreme Court Committee on Rules of Evidence, appeared in that capacity in support of the bill. He was there with the approval of the court and with its request that he appear in support. The work which the evidence commission undertook was the result of last session's SJR 24 which stated the court, through the commission, should undertake a study of the current statutes relating to venue. The current bill deals only with the venue proportions of that joint resolution. The initial work was undertaken by Professor Crowley. He distributed the commission's report, which indicated there are hundreds of cases on venue (see Exhibit 1). The purpose of the study the commission undertook was not to change the law, but to include as a first purpose within the code sections themselves the rules that have become settled over the years though the case law. The second purpose of the study was to update the language and clarify it in modern terminology. The third purpose was to clarify any areas where there seemed to be some ambiguity in the present state of the law. The bill came to the committee with the recommendation of the commission and with the approval of the court. William F. Crowley, Professor of Law at the University of Montana, stated he was the person mainly guilty for the form of the bill. In

CONSIDERATION OF COMMITTEE BILL DRAFTING REQUEST: Senator Mazurek stated a constituent of Senator Brown's came to him from the Montana Juvenile Probation Officers' Association. They had met yesterday to consider some proposed legislation which came up with a bill, but the deadline for introduction of bills had passed, unless it can be submitted as a committee bill. Senator Towe moved the committee submit Exhibit 5 as a committee bill. Senator Mazurek stated this is not a commitment to support the bill; it would just allow it to be drafted. Senator Crippen stated he had some question about the language on page 2, lines 1-3. The motion carried unanimously.

(cks) Action on
~~FURTHER CONSIDERATION OF~~ SB 90: Senator Towe stated he had some concern with page 6, lines 17-19. He proposed we add "or when the evidence becomes reasonably available" and "such evidence must be revealed as set forth in section 7." Mr. McGrath stated he had no problems with that provision. Senator Pinsoneault stated he agreed with Senator Towe, but thinks it is redundant, as the judge will decide whether or not there is good cause. Senator Towe was concerned that some judge might say you could have tried harder. Senator Mazurek stated the 20 days is only when the time period starts. It is an ongoing process which terminates 5 days in advance of trial unless there is good cause. Senator Towe stated it does not say that, but that is what he wants it to say. Senator Mazurek asked why have the bill at all if you get 5 days before trial and they decide to give you the evidence. Senator Blaylock asked when the defendant has to produce evidence now. Senator Mazurek responded he doesn't. Senator Blaylock suggested upping the 20 days to 40. Senator Towe stated he had no problem with 20 days in the event you make it clear the defendant must reveal the information when it becomes reasonably available. He is nervous about the language here without making sure the judge will "for good cause shown." Senator Pinsoneault stated the judge will make that determination. He thinks adding that lannuage is unnecessary and it confuses rather than clarifies, because he would hope the judge would have enough intelligence to realize it. Senator Mazurek stated he thought it would be extremely rare when a judge would preclude a defendant's bringing in evidence that would exonerate him. Senator Towe stated he had no problem with evidence that might exonerate him, but asked about insignificant evidence. Senator Mazurek stated 20 days is the commencement of the period--you don't have to get everything in in the first 20 days. Senator Daniels stated you will never eliminate gamesmanship from criminal trials. Senator Shaw moved that SB 90 be recommended DO PASS. He then withdrew his motion. Senator Shaw moved that SB 90 be amended as follows:

Page 3, line 25.
Following: "4"
Strike: "(2)"
Insert: "(3)"

This amendment deals with disclosure of the informant's identity. The amendment carried unanimously. Senator Towe moved SB 90 be amended as follows:

Page 6, line 20.
Following: "shown."
Insert: "Any evidence that reasonably becomes available after the initial 30 days shall be admitted if (section 7) is complied with."

Senator Yellowtail stated he still was not sure that solved the problem if this were read literally. He suggested we strike the word, within, on page 6, line 4. Senator Towe's motion to amend the bill carried unanimously. Senator Blaylock asked when the defendant gets a lawyer. Senator Mazurek responded if not before, he will have one after the initial appearance, but prior to arraignment. Karl Englund, from the Montana Trial Lawyers Association, stated the statute provides a one-day period after his appearance in district court for his arraignment. If there is a question about mental competency or proper venue, the arraignment is put off. Generally, he will be arraigned on the day of his initial appearance or within 24 hours thereafter. Senator Towe explained oftentimes they will attempt arraignment at the initial appearance. Senator Blaylock moved to amend the bill as follows:

Page 6, line 4.
Following: "Within"
Strike: "20"
Insert: "30"

In addition to this change, his motion carried with it an amendment to Senator Towe's previous amendment which would change the 30-day period to 20 days. The motion carried unanimously. Senator Towe moved to amend the bill as follows:

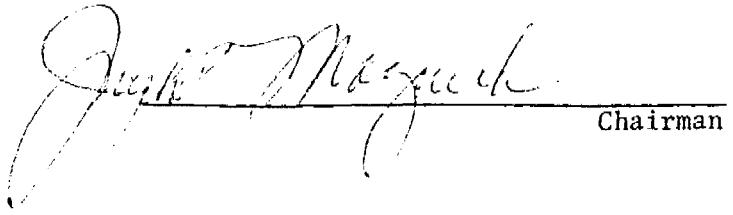
Page 9, line 3.
Following: "requirement"
Insert: "or that other good cause is shown"

The amendment carried unanimously. Senator Shaw moved that the bill be recommended DO PASS AS AMENDED. Senator Crippen stated the comment was made that this was a bill that was a search for the truth. He believes our criminal justice system is based on the fact the defendant is innocent until proven guilty. He believes we will be codifying some case law he disagrees with. He is still persuaded it is up to the state to prove that the defendant is guilty. It is not up to the defendant to help him in any way. It's the state that brings the charge, it's the state that must prove the offense, and anything less is back in the days

of the guillotine. Senator Pinsoneault stated the defendant is entitled to a speedy trial. He believes time is always in the defense counsel's favor. He believes this bill adds to the process in speeding up the process, because, as the defense counsel, the meter fee keeps running; it is a giant step forward on both sides. Senator Yellowtail stated he is in sympathy with efficiency and cost effectiveness, but thinks we have to be concerned for the defendant that is stuck with a public defender. Senator Daniels stated this bill will not eliminate ingenuity from the courts of law. Senator Towe stated this bill cuts both ways. If it is constitutionally required and not protected by the fifth amendment, which the courts have so ruled, and if the prosecution can get it anyway if he files the right motion, then he has no problem with this bill. Senator Mazurek stated one of the principal reasons the prosecution brought this bill is because of the Van Dyken case in Missoula. Senator Crippen stated the committee should not rely on the search for the truth, because that is falacious. The motion to recommend SB 90 DO PASS AS AMENDED carried, with Senators Crippen, Galt, and Yellowtail voting in opposition.

FURTHER CONSIDERATION OF SB 63 AND SB 110: Senator Mazurek stated there has been some concern expressed to him that we should not allow arbitration in the insurance area. Senator Towe stated he was concerned with parties of unequal bargaining positions. Senator Pinsoneault stated the arbitration caluse should be put in bold face print on the first page of the contract and have both parties initial it. Senator Mazurek stated if you have an adhesion contract, you lose that defense. Senator Towe stated he wants a comparable bargaining position and asked that Mr. Petesch look into this. Senator Mazurek asked Mr. Petesch to see what other states are doing. Chairman Mazurek stated Senator Halligan has been working with Mr. Petesch on some proposed changes in the area of defining plain language on page 2 of the bill, and the committee will not act on it until he has had a chance to work with Mr. Petesch.

There being no further business to come before the committee, the meeting was adjourned at 11:40 a.m.



Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 012285

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

STANDING COMMITTEE REPORT

January 22 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 90

first reading copy (white color)

EXPANSION OF DISCOVERY IN CRIMINAL CASES

Respectfully report as follows: That SENATE BILL No. 90

be amended as follows:

1. Page 3, line 25.
Following: "4"
Strike: "(2)"
Insert: "(3)"

2. Page 6, line 4.
Following: "within"
Strike: "20"
Insert: "30"

3. Page 6, line 20.
Following: "shown."
Insert: "Any evidence that reasonably becomes available after the initial 30 days shall be admitted if (section 7) is complied with."

4. Page 9, line 3.
Following: "requirement"
Insert: "or that other good cause is shown"

AND AS AMENDED

DO PASS

XXXXXXXXXXXX

Chairman.

(To keep current -- post bills when entering being heard or leaving committee.) Form CS-32

STATUS SHEET

FORTY-NINTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

SENATE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
SB 5	1/18/85	3/7/85	2/7/85				2/7/85		
SB 26	1/19/85	3/11/85 3/12/85	(Tabled 3/12/85)	Reconsidered 3/28/85 and passed out with BE AS AMENDED				CONCURRED IN	
SB 57	1/22/85	3/7/85	3/7/85				3/7/85		
SB 27	1/23/85	3/8/85	3/8/85				3/8/85		
SB 80	1/24/85	3/11/85	3/11/85				3/11/85		
SB 2	1/26/85	3/6/85 3/7/85	(TABLED 3/7/85)						
SB 3	1/28/85	3/6/85 3/7/85	3/7/85				3/7/85		
SB 85	1/28/85	3/8/85	3/11/85				3/8/85		
SB 90	1/28/85	3/8/85 3/11/85	3/11/85					3/11/85	
SB 91	1/28/85	3/7/85 3/8/85	3/8/85					3/8/85	
SB 60	1/29/85	3/7/85 3/8/85	3/8/85				3/8/85		
SB 87	1/29/85	3/7/85	3/7/85				3/7/85		
SB 28	2/27/85	3/12/85 3/22/85	3/22/85					3/22/85	
SB 54	2/27/85	3/12/85	3/12/85					3/12/85	
SB 89	2/27/85	3/12/85 3/19/85	3/19/85					3/19/85	
SB 104	2/27/85	3/11/85	3/11/85				3/11/85		

Use a separate sheet for Senate, House Bills, and Resolutions

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 8, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Friday, March 8, 1985 at 9:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Gould who had been previously excused.

CONSIDERATION OF SENATE BILL NO. 27: Senator M. K. Daniels, District #24, sponsor of SB 27, testified in its support. Senate Bill No. 27 was introduced by request of the Joint Interim Subcommittee No. 3. This legislation is a somewhat minor step in the direction of court reform which would result in more uniform court actions and court results. The bill would require clerks of district court and deputy clerks of district court to attend orientation courses and training sessions conducted by the supreme court administrator.

Mike Abley, administrator of the Montana Supreme Court, testified as a proponent. He said the Clerk of Courts Association have pushed very strongly for this bill.

There being no further proponents or opponents, Senator Daniels closed.

The floor was opened to questioning.

In response to a question asked by Rep. Montayne, Mr. Abley stated that the major portion of the cost will go towards travel and per diem for the clerks.

Chairman Hannah referred to the fiscal note and asked if the note represents all clerks travelling to a course but does not represent any grants that are currently received that might reduce it. Mr. Abley stated that that was correct. Chairman Hannah wanted to know if Mr. Abley has any idea of how much grant money was raised during last year for these kinds of events. Mr. Abley replied $6,000.

Rep. Eudaily asked if it weren't possible under the bill for the district judge to continue to excuse these clerks from attending these courses. Mr. Abley said that although they could, he pointed out that the clerks are pushing for this training, and it would be very unlikely for them to request the judges to excuse them on a continuing basis.

There being no further questions, hearing on SB 27 closed.

CONSIDERATION OF SENATE BILL NO. 85: Senator Bob Brown, District #2, chief sponsor of SB 85, testified. He informed the committee that this bill had its origin back in 1981 when the Attorney General's office sponsored a conference on criminal justice issues. This is an act allowing the Department of Justice to establish a criminal intelligence information section within its criminal investigation bureau. He said that a lot of preparation and thought has gone into this piece of legislation. It also establishes an advisory council and establishes the duties of that council. The bill is based on the Rocky Mountain Information Network which is a criminal information sharing network of Rocky Mountain State's Headquarters in New Mexico. It is also patterned somewhat after the NCIC (National Crime Information Center) which deals with stolen property. SB 85 fills a need because it creates a workable mechanism for a criminal information bank in the Attorney General's Office in a centralized location, but it also provides the statutory safeguards that keep the information that is obtained in the bank from being misused.

Mike Lavin, administrator of the Board of Crime Control, spoke in favor of the bill. He submitted a copy of his testimony which was marked Exhibit A and attached hereto.

Dorothy McCarter, Assistant Attorney General, stated that she staffed the task force committee during the drafting of this legislation. She said the new section will exist only to serve as a service to local law enforcement agencies. The information will not be used by the state criminal justice agency -- it is only used by the local law enforcement. At the same time, this new section will protect the integrity and reliability of the information in periodic review.

There being no further proponents or opponents, Senator Brown closed.

The floor was opened up for questions.

In response to a question by Rep. Addy, Gary Carrell, chief of the Criminal Investigation Bureau, stated that at the present time, the bureau does not have the personnel to set up the information section. All this does is give us the authority to do it. (Referring to section 4 of the bill). He said that the other related bill in which the FTE's referred to in the fiscal note are provided for was Senate Bill 338. There was a question with this bill whether or not it is an appropriation bill.

Following a few more general questions, hearing closed on SB 85.

CONSIDERATION OF SENATE BILL NO. 90: Senator Joe Mazurek, District #23, principle sponsor of SB 90, testified in support of it. He stated that SB 90 was introduced at the request of the Montana County Attorney's Association. He

feels this is a real significant piece of legislation which warrants the committee's serious consideration. It has been said that it is a somewhat radical change from existing practice in the state of Montana. It is a bill patterned after a bill which was introduced in the state of Arizona whose constitutionality has been upheld in that state. This bill injects reciprocal discovery into the criminal process. Discovery is the exchange of information between the parties prior to trial. He feels this bill will facilitate the search for the truth in that it would hopefully eliminate some of the surprise that is involved in criminal matters. It would facilitate more open communication between prosecutors and defense attorneys. The bill sets the rules for pre-trial discovery. He said that much of what is in the bill is already required. The whole idea of the bill has to do with the question of fairness. He said the biggest argument he has heard against the bill is that the only thing the defense has going for itself in a criminal action is the element of surprise, and that the state has this vast police force -- which they do -- to go out and investigate crimes and hire experts. In those cases where the defense needs experts and investigators, they are hired at county expense in addition to providing a defense counsel. He feels the whole idea behind the bill is fairness. And that is to allow both sides to prepare their cases for trial just as they do in a civil procedure. It requires the disclosure of information on both sides which would hopefully eliminate some of the element of surprise and eliminate some of the gamesmanship involved. He feels the final result will speed up the process and help preserve the integrity of the criminal justice system. He briefly explained the sections of the bill.

Mike McGrath, county attorney for Lewis and Clark County, testified as a proponent. He said the most important thing in trying a lawsuit is the preparation. He said the most frustrating thing about prosecuting a criminal case is that you can prepare your side of the case, but you cannot prepare for what the defendant is going to do because you don't know what the defendant is going to do. In civil cases, both sides get full discovery from each other; however, that is not so in a criminal case. He feels that the advantage of supplying each party with full discovery is that it will allow the jury to obtain a full and accurate picture of the facts. He said that SB 90 is designed to make the system fair, and would allow the jury to obtain all the information in a particular case. Mr. McGrath informed the committee of several cases that he has tried where this legislation could have really helped him in preparing and prosecuting his cases. He further stated that this bill does not violate a defendant's rights against self-incrimination. The bill is based on an Arizona statute which has been upheld in that state.

Senator R. J. "Dick" Pinsoneault, District #27, testified as a proponent to SB 90. A copy of his written testimony was marked Exhibit B and attached hereto.

Because Senator Mazurek had to leave to chair the Senate Judiciary Committee, Chairman Hannah temporarily opened the floor up for questions from the committee.

Rep. Addy had a question with respect to page 8, lines 11 and 12 of the bill. He wanted to know why field notes are exempted. Mark Murphy, from the Attorney General's Office, stated that this is already presently excluded from discovery. As a general rule, field notes are destroyed after a formal report has been prepared.

Rep. Addy said that the field notes are taken at a point in time when there may not be any theory of case. Quite often, those field notes -- if the theory of the case changes -- may be inconsistent with the theory of the case, and Rep. Addy would like them on the table.

Mr. Murphy responded by saying that as the general rule, the formal reports are written immediately after at the first available time the officer has to sit down and prepare these formal reports. A number of officers no longer use these field notes. They use tape recording or something that is destroyed immediately after. (The official reports are generally prepared again prior to the time a position has been taken by the prosecution and during the investigation itself.)

Rep. Krueger wanted to know if Senator Mazurek has compared this piece of legislation in relation to the federal process. Senator Mazurek stated that he had not.

There being no further questions asked of Senator Mazurek, Chairman Hannah dismissed him.

John Connor, Jefferson County Attorney, stated that it wasn't until he became a prosecutor that he was struck by the disparity that exists with respect to the exchange of information between parties. He feels that under the present system, the jury is becoming confused and disillusioned, and he has observed jurors expressing anger as to why some of his information is being withheld from them.

Robert Deschamps, Missoula County Attorney, testified as a proponent to SB 90. Mr. Deschamps stated that counties do not have the resources to call in a lot of the same expert witnesses the defense is able to. He feels this bill goes a long way to bringing the truth to the surface. He doesn't agree with the surprise gamesmanship notion that some do.

Mark Murphy, Assistant Attorney General, stated that he was assigned the task of reviewing the constitutionality of this discovery bill. He said the U.S. Supreme Court has been asked to look at reciprocal discovery in a number of cases

but has not yet accepted any of those cases for review, so cases that have upheld reciprocal discovery have not been overturned by the Supreme Court. He believes that this bill is constitutional -- even under the Montana Constitution -- and that from a practical standpoint, he feels this provision will assist in the speedy resolution of cases prior to trial. It will allow the prosecutors to review the defendant's case prior to trial and to evaluate it.

Karl Englund, representing the Montana Trial Lawyers Association, testified as a proponent. He said that while there are some good provisions in this bill, there are a few that he has a problem with.

(Rep. Brown came in)

He stated that section 1 of the bill is redundant with Montana's existing law unless our existing law is going to be repealed. He also feels the word "defendant" should be amended to "accused". He suggested on page 5 line 10 following "prosecutor" that the words "and for good cause" be inserted. He further suggested other changes that he feels are needed in the bill. He feels the 30-day provision on page 6 may be a little unrealistic.

(Rep. Gould came in)

Mr. Englund also feels the language on page 8, section 4 (a) is too broadly written. Finally, Mr. Englund made the comment that "You can eliminate some of the gamesmanship in a trial, but you can not eliminate all of it."

There being no further proponents or opponents, Chairman Hannah opened the floor up for questions.

Rep. O'Hara asked Mr. McGrath to comment on some of the comments made by Karl Englund. Mr. McGrath stated that the 30-day requirement is merely a trigger device. He commented on other points brought out by Mr. Englund.

Rep. Rapp-Svrcek asked Mr. McGrath what the prosecutor does with the list of witnesses once they have it in their hands. Mr. McGrath stated that they would inquire certain information from those witnesses.

In response to a question asked by Rep. Krueger, Mr. McGrath feels that an attorney is obligated to disclose information as soon as the attorney knows that particular witness is going to be used.

Rep. Krueger wanted to know what other states have other than Arizona has a broad-base reciprocal discovery law such as this act. Mr. Murphy said that from a legislative deter-

mination, there are not very many. In most states that have a reciprocal discovery procedure, it was created by the courts.

Rep. Rapp-Svrcek wanted to know how many of these things which are presently exempted in section 4 from disclosure are presently available. Mr. McGrath said that none of them are available to defense attorneys.

Rep. Addy is wondering if the concept of fairness might moderate the pursuit of truth. He feels that there needs to be a line drawn between truth and fairness. Would this bill permit discovery of the defendant's rebuttal witnesses? Mr. Connor said that it is not addressed in the bill.

Following further general questions, hearing closed on SB 90.

EXECUTIVE SESSION

An executive session was called at 11:25 a.m. to act on the bills in committee.

ACTION ON SENATE BILL NO. 27: Rep. Darko moved that SB 27 BE CONCURRED IN. The motion was seconded by Rep. Addy. The question was called, and the motion carried with Reps. Hannah and Brown dissenting. (Rep. Keyser and Rep. Grady were not present to vote.) Rep. Darko agreed to carrying the bill on the floor.

ACTION ON SENATE BILL NO. 85: Rep. Mercer moved that SB 85 BE CONCURRED IN. The motion was seconded by Rep. O'Hara. The question was called, and the motion carried with Reps. Brown, Montayne and Eudaily dissenting.

ACTION ON SENATE BILL NO. 91: Rep. Mercer moved that SB 91 BE CONCURRED IN. The motion was seconded by Rep. Bergene.

Rep. Krueger submitted amendments to SB 91 which he moved to adopt. He informed the committee that this particular language is adopted after the California law. The amendment is as follows:

1. Page 3, line 15.
   Following: "(1)"
   Insert: "except as provided in subsection (3),"

2. Page 4, line 1.
   Following: "complaint"
   Insert: "; (3) the proper place of trial of an action brought pursuant to Title 40, chapter 4 is the county in which the petitioner has resided during the 90 days preceding the commencement of the action"

The motion was seconded by Rep. Mercer, the question called,

EXHIBIT B
3/8/85
SB 90

The Big Sky Country

MONTANA STATE SENATE

SENATOR R. J. "DICK" PINSONEAULT
DISTRICT 27
BOX 250
ST. IGNATIUS, MONTANA 59865
HOME PHONE: (406) 745-4221
WORK PHONE: (406) 745-2722

COMMITTEES:
EDUCATION, VICE CHAIRMAN
JUDICIARY
LOCAL GOVERNMENT

January 31, 1985

Members of the House Judiciary Committee

Dear:

You will soon have for consideration SB 90 which is entitled "AN ACT TO EXPAND DISCOVERY IN CRIMINAL CASES: PROVIDING FOR MUTUAL AND RECIPROCAL DISCOVERY IN CRIMINAL CASES; AND REPEALING SECTIONS 46-15-301 THROUGH 46-15-303, MCA." This legislation is modeled after Arizona's, and their experience is that it works very well and has been declared constitutional by their Supreme Court.

What it is designed to do, is simply SPEED UP THE CRIMINAL PROSECUTION PROCESS. Keep in mind that the 6th Amendment to

our Federal Constitution and Article 2, Section 24 of our State Constitution guarantees to the criminal defendant a "speedy and public" trial. As an attorney in private practice and acting as public defender on an assignment basis, as a former prosecutor, judge, and for five years involved in all phases of police work, I think I had a good perspective of the criminal judicial process.

As a general proposition, and speaking as a defense counsel, "time" is always on the defendant's side. This is so for several reasons; time suaves emotions; people tend to forget; witnesses disappear; etc. etc. etc. Noone need remind you that the criminal dockets in this state are suffering a severe backlog. In addition to backlogs, there are seemingly endless delays and continuances, many warranted, which the defense counsel continues to bring before our district court judges, especially in felony violations. Section 2 and 3 are the "guts" of this bill. You will note that disclosure by the prosecution includes any and all information the state has available to it and contemplates using in the prosecution of the defendant.

This is not a departure from the current law, since this has always been required by our current statute. You will note that in Section 3, there is a reciprocal requirement toward disclosure by the defendant. Do not be misled into thinking that this information was not available under the old

statute. What was required, was a series of orders and requests by the prosecution to the district judge asking or directing that those things which this act would require disclosed by the defendant and are now outlined in subsection (1), subparagraph (a) through (h) of Section 3.

This may appear at first blush to amount to self-incrimination; however, keep in mind that this requirement does not arise until there has been filed in the district court an indictment or information on the defendant which means the probable cause threshhold has already been met.

ALSO KEEP IN MIND, THAT IN SUBSECTION 2, THE DEFENDANT IS ENTITLED TO THE PRESENCE OF COUNSEL AT THE TAKING OF ANY EVIDENCE PURSUANT TO SUBSECTION (1).

Subsections (3) and (4) under Section 3, further elaborate on the type of information that the defendant shall provide to the state and setting a time limit of 30 days. You will also note that at the end of subparagraph (3) there has been added this sentence: "Any evidence that reasonably becomes available after the initial 30 days shall be admitted if (Section 7) is complied with." This provision was added by the Senate Judicial Committee as a protection to the defendant and to insure that the 30 days would not be construed by the presiding judge as an ultimatum or mandate.

You will also note that in Section 4 of the bill there are certain materials that are not subject to disclosure. This applies to the defendant as well as to the prosecution.

Another important aspect of this bill is Section 7 which provides for "a continuing duty to disclose." This applies to the prosecution as well as to the defendant.

Section 8 is a very important section of this bill as it is characterized as "excision and protective orders." What it does in a nutshell is to provide protection to both the state and the defendant in disallowing material that is not relevant; it allows the presiding judge to look at the material or information that is sought to be discovered and a hearing conducted by the presiding judge to determine whether or not the material should in fact be "discovered."

Section 9 is entitled "Sanctions" and allows a presiding judge to hold in contempt either the prosecution or the defendant (his attorney) for failing to comply with any of the provisions of this act. You will note that at page 25, line 10 and line 1, page 11 that the presiding judge may impose any sanction that it finds just under the circumstances, including but not limited to:..." You will also note in subparagraph (5) the court may "declare a mistrial when necessary to prevent a miscarriage of justice."

You find opponents to this bill who will say that the state with all of its unlimited resources stands in an unfair position as far as the prosecution of a criminal case is concerned. To this, I say "nonsense." Within the past year in Beaverhead County, a homicide case was faced with at least ten continuances and delays that extended the case from a year to 18 months from indictment to trial. Since the defendant was indigent, his counsel(s) were paid from taxpayers' monies in excess of $19,000. This is more than the County Attorney in Beaverhead County makes in one year.

The bottom line in this whole bill is to simply "speed up" the process, and in speeding up the process it is not intended that we deny the defendant his rights to a "fair and impartial trial."

What it simply does is have the defendant as well as the prosecution lay his cards on the table, if you will, in the beginning, and that is as it should be. A speedy trial demands no less and will not in my opinion impede his defense counsel or deny the defendant a fair trial.

Very Respectfully,

R.J."Dick" PINSONEAULT
Senate District 27

RJP/dw

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/8/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)			✓
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		✓
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE BILL NO. 27 (Sen. Daniels); 85 (Sen. Brown); 90 (Sen. Mazurek) DATE March 8, 1985

SPONSOR

NAME (please print)	~~RESIDENCE~~ REPRESENTING	SUPPORT	OPPOSE
M. Ke Abley	Supreme Court	27	
Mike LAVIN	Board of Crime Control	SB85	
Dorothy McCarter	Attorney General	SB85	
Mark L Murphy	A G	SB90	
Mike McGrath	~~I & E~~ MONTANA COUNTY ATTY ASSN	SB90	
John Connor	Mont. County Atty Assn	SB 90	
Jerry Loobey	Board of Crime Control	SB90	
Robert L. Deschamps III	Co. Atty Assn	SB90	
Dianne Donnelly	Mont Assoc of Counties	SB 85	
Marcella Quist	Dist Court Clerks	SB 27	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 11, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Monday, March 11, 1985 at 10:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 104: Senator Mike Halligan, District #29, sponsor of SB 104, testified. He told the committee that Montana would be one of the last states to allow computerized jury selection. This legislation does not mandate computerized jury selection -- it just allows counties that have that capability to create that option rather than using the traditional jury box method.

He feels computerized jury selection would increase efficiency, while it would insure that the integrity of the jury selection process is maintained. (Exhibit A.)

Pat Melby, representing the State Bar of Montana, wished to go on record as favoring this bill. He feels it will increase the efficiency of the courts.

Jim Dopp, records master of Missoula County, testified as a proponent to this bill. He said this legislation is strictly permissive. The bill requires the judges of a district to approve any computerized system. This is one more method of bringing governmental costs in line with the present systems. He submitted a summary of SB 104 which was marked Exhibit B and attached hereto.

There being no further proponents or opponents, Senator Halligan closed.

The floor was opened for questions.

Rep. Mercer stated that his experience with computers has been that when computers generate random numbers, they always generate the same random numbers -- so they really aren't random. In this particular law, we place it in a box and statutorily guarantee that it is going to be random. If we turn it over to computers, will that somehow make it predictable. Mr. Dopp said that there are several different systems that are used by various states, counties, etc. The number of jurors that are in other states, such as California, implement a totally random number, whereas in the computer each time through generates a new number, and that particular jury is selected. It is up to the individual district to employ a system.

said that it is very unlikely that that would be a piece of land which would be sought after by the tribe.

Following further questioning, hearing closed on SB 26.

EXECUTIVE SESSION

Chairman Hannah called an executive session to order at 11:45 a.m.

ACTION ON SENATE BILL NO. 90: Representative Hammond moved that SB 90 BE CONCURRED IN. The motion was seconded by Rep. O'Hara.

Rep. Hammond moved to adopt the amendments which were previously adopted at yesterday's meeting. The motion was seconded by Rep. Eudaily.

Rep. Rapp-Svrcek submitted a copy of proposed amendments to HB 90 which were marked Exhibit K and attached hereto. He pointed out that amendments 1 through 16 have already been adopted by the committee. He moved that the committee adopt amendment no. 17 which would amend the bill as follows:

Page 9, line 7
Following: "materials."
Strike: "Any"
Insert: "Except as provided in 46-11-401, any"
Following: "materials"
Insert: ", including witness lists,"

The motion was seconded by Rep. Mercer and carried unanimously.

Rep. Montayne submitted copies of his proposed amendments of which was marked Exhibit L and attached hereto. Note that his first amendment has already been adopted. Rep. Montayne further moved to adopt his amendments #2 and #3. Said motion was seconded by Rep. Addy and discussed.

Rep. Montayne feels that it is necessary to protect witnesses from undue harrassment of the press and others.

(Rep. Brown came in)

Rep. Addy made a substitute motion to amend Rep. Montayne's amendment #3 by placing the term of imprisonment at six months and by decreasing the fine from $10,000 to $500. The motion was seconded by Rep. Hammond. Rep. Addy feels these sanctions will provide a sufficient deterrent.

Rep. Miles stated that she has a problem with the way this amendment is written. She feels that they are doing the work of the court.

It was Rep. Hannah's opinion that there may be a lot of potential problems with this amendment. Rep. Mercer, too, spoke against the amendment in that he feels it may present some constitutional problems.

Without objection, the question was divided with regards to amendment #2 and amendment #3. As to amendment #2, the motion to adopt failed 7-10. (See roll call vote.)

The question was called on Rep. Addy's substitute motion to decrease the penalty and to decrease the fine. The motion carried unanimously on a voice vote.

The question was called on Rep. Montayne's amendment #3, which would include the newly adopted language to decrease the fine and term of imprisonment, failed on a voice vote.

Rep. Krueger further moved to amend page 6, line 4 by striking "30" and inserting in lieu thereof "45"; also, on page 6, line 21 strike "30" and insert "45". The motion was seconded by Rep. Brown. Rep. Krueger doesn't feel 30 days is sufficient time for defendant to provide the prosecutor with a written notice of his intention to introduce evidence at the trial.

Rep. Mercer spoke against this amendment. The question was called, and Rep. Krueger's motion to amend failed.

Rep. Addy moved on page 2, line 13 to strike following "(1)" "Within 10 days after" and insert "Upon". The motion was seconded by Rep. Mercer, and the motion carried unanimously.

Rep. Hammond moved that SB 90 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. O'Hara. The question was called, and the motion carried with Reps. Montayne, Krueger and Brown dissenting. Rep. Rapp-Svrcek will carry the bill.

ACTION ON SENATE BILL NO. 104: Rep. Addy moved that SB 104 BE CONCURRED IN. The motion was seconded by Rep. Bergene. The question was called, and the motion carried unanimously. Rep. O'Hara volunteered to carry the bill.

ACTION ON SENATE BILL NO. 80: Rep. Hammond moved that SB 80 BE CONCURRED IN. The motion was seconded by Rep. Cobb. The question was called, and the motion carried with Reps. Brown and Hannah dissenting. Rep. Hammond volunteered to carry the bill.

ACTION ON SENATE BILL NO. 144: Rep. O'Hara moved that SB 144 BE CONCURRED IN. The motion was seconded by Rep. Mercer and discussed.

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/11/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 11, 1985 BILL NO. SB 90 TIME

NAME	AYE	NAY
Kelly Addy	✓	
Toni Bergene		✓
John Cobb	✓	
Paula Darko		✓
Ralph Eudaily		✓
Budd Gould	✓	
Edward Grady		✓
Joe Hammond	✓	
Kerry Keyser		
Kurt Krueger		✓
John Mercer		✓
Joan Miles		✓
John Montayne	✓	
Jesse O'Hara		✓
Bing Poff		✓
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)	✓	
Tom Hannah (Chairman)		✓

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Montayne moved to adopt his amendment #2 which would amend page 9, line 8 of the bill following "disclosed" by inserting: ", by the attorney, an employee of the attorney, or any person to whom the information is communicated for the necessary conduct of the case,". The motion was seconded by Rep. Addy, and the motion failed 7-10.

STANDING COMMITTEE REPORT

March 11 19 85

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 90

Third reading copy (Blue color)

EXPANSION OF DISCOVERY IN CRIMINAL CASES

Senate 90

Respectfully report as follows: That Bill No.

be amended as follows:

1. Page 2, line 13.
Following: "(1)"
Strike: "Within" through "after" on line 14.
Insert: "Upon"

2. Page 2, line 23.
Strike: "defendant"
Insert: "accused"

3. Page 3, line 1.
Strike: "defendant"
Insert: "accused"

4. Page 3, line 9.
Strike: "defendant"
Insert: "accused"

DO PASS

(continued)

REP. TOM HANNAH, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

5. Page 3, line 11.
Strike: "defendant's"
Insert: "accused's"

6. Page 5, line 3.
Strike: "defendant"
Insert: "accused"

7. Page 5, line 6.
Strike: "defendant"
Insert: "accused"

8. Page 5, line 8.
Strike: "defendant"
Insert: "accused"

9. Page 5, line 10.
Following: "prosecutor"
Insert: "and for good cause shown"

10. Page 5, line 23.
Strike: "defendant"
Insert: "accused"

11. Page 6, line 10.
Strike: "defendant"
Insert: "accused"

12. Page 6, line 15.
Strike: "may"
Insert: "shall"

13. Page 7, line 3.
Strike: "defendant"
Insert: "accused"

14. Page 7, line 21.
Strike: "defendant's"
Insert: "accused's"

15. Page 8, line 4.
Following: "for"
Strike: "a"
Insert: "the"

Following: "product"
Strike: "that" through "notes" on line 12.
Insert: "of the prosecuting or defense attorney"

(continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

16. Page 8, line 13.
Strike: "Disclosure" through "if" on line 14.
Insert: "If"

17. Page 8, line 15.
Following: "contained"
Strike: "therein"
Insert: "in the work product, that information must be disclosed"

18. Page 9, line 7.
Following: "materials."
Strike: "Any"
Insert: "Except as provided in 46-11-4)1, any"

Following: "materials" the second time it appears on line7.
Insert: ", including witness lists,"

AND AS AMENDED,
BE CONCURRED IN

Chairman.

REP. TOM ASHMAN

STATE PUB. CO.
Helena, Mont.

SENATE BILL NO. 90

INTRODUCED BY MAZUREK, FULLER

A BILL FOR AN ACT ENTITLED: "AN ACT TO EXPAND DISCOVERY IN CRIMINAL CASES; PROVIDING FOR MUTUAL AND RECIPROCAL DISCOVERY IN CRIMINAL CASES; AND REPEALING SECTIONS 46-15-301 THROUGH 46-15-303, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.

Section 2. Disclosure by prosecution. (1) ~~Within--10 days--after~~ UPON arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the ~~defendant~~ ACCUSED and of any person who will be tried with him;

(c) the names and addresses of experts who have

personally examined the **defendant** ACCUSED or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons, including all written reports or statements made by them in connection with the particular case;

(d) a list or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or purportedly belong to the **defendant** ACCUSED; and

(e) all material or information that tends to mitigate or negate the **defendant's** ACCUSED'S guilt as to the offense charged or that would tend to reduce his punishment therefor.

(2) At the same time the prosecutor shall inform the defendant of and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the accused was a party;

(b) whether a search warrant has been executed in connection with the case;

(c) whether the case has involved an informant, and, if so, his identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana

Rules of Evidence and [section 4~~(2)~~(3)].

(3) The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for and that he is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at such later time as the court may for good cause permit, together with their relevant written or recorded statements, a list of the names

and addresses of all persons whom he intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the ~~defendant~~ ACCUSED did not have a particular state of mind that is an element of the offense charged.

Section 3. Disclosure by ~~defendant~~ ACCUSED. (1) At any time after the filing in district court of an indictment or information, the ~~defendant~~ ACCUSED, in connection with the particular crime with which he is charged, shall upon written request of the prosecutor AND FOR GOOD CAUSE SHOWN:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of his hair, blood, saliva, urine, or other specified materials that involve no unreasonable intrusions of his body;

(g) provide specimens of his handwriting; or

(h) submit to a reasonable physical or medical inspection of his body; however, such inspection does not include psychiatric or psychological examination.

(2) The ~~defendant~~ ACCUSED is entitled to the presence of counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law.

(3) Within ~~20~~ 30 days after arraignment in district court or at such later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of his intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the ~~defendant~~ ACCUSED did not have a particular state of mind that is an essential element of the offense charged. The notice must specify for each defense the names and addresses of the persons that will be called as witnesses at trial in support of the defense. Prior to trial the defendant ~~may~~ SHALL, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except for good cause shown. ANY EVIDENCE THAT REASONABLY BECOMES AVAILABLE AFTER THE INITIAL 30 DAYS SHALL BE ADMITTED IF [SECTION 7] IS COMPLIED WITH.

(4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make

available to the prosecutor for testing, examination, or reproduction:

(a) the names and addresses of all persons, other than the ~~defendant~~ ACCUSED, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(b) the names and addresses of experts whom he will call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection with the particular case; and

(c) a list of all papers, documents, photographs and other tangible objects that he will use at trial.

(5) The defendant's obligation under this section extends to material and information within the possession or control of the defendant or his attorneys and agents.

(6) Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the ~~defendant's~~ ACCUSED'S constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by

the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Section 4. Materials not subject to disclosure. (1) Except as provided in subsection (2), disclosure is not required for ~~a~~ THE work product ~~that includes:~~

~~(a) legal research, records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecutor or members of his legal or investigative staff, law enforcement officers, or defense counsel or his legal or investigative staff; or~~

~~(b) documents made by law enforcement officials for internal communications or law enforcement officers' field notes~~ OF THE PROSECUTING OR DEFENSE ATTORNEY.

(2) ~~Disclosure of a work product referred to in subsection (1) may be required if~~ IF exculpatory information is contained ~~therein~~ IN THE WORK PRODUCT, THAT INFORMATION MUST BE DISCLOSED.

(3) Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

Section 5. Failure to call a witness or raise a

defense. The fact that a witness' name is on a list furnished pursuant to [this act] or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows such comment after finding that the inclusion of the witness' name or the pretrial notice constituted an abuse of the applicable disclosure requirement OR THAT OTHER GOOD CAUSE IS SHOWN.

Section 6. Use of materials. Any EXCEPT AS PROVIDED IN 46-11-401, ANY materials, INCLUDING WITNESS LISTS, furnished to an attorney pursuant to [this act] may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

Section 7. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, such party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

Section 8. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any

other disclosures required by [this act] be denied, deferred, or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under [this act], it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit him to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when such presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable under [this act], the entire text of the material must be sealed and preserved in the record in the event of an appeal.

Section 9. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the

court that a party has failed to comply with any of the provisions of [this act] or any order issued pursuant to [this act], the court may impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

Section 10. Codification instruction. Sections 1 through 9 are intended to be codified as an integral part of Title 46.

Section 11. Repealer. Sections 46-15-301 through 46-15-303, MCA, are repealed.

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